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**IN THE SUPREME COURT
STATE OF ARIZONA**

PETITION TO AMEND ARIZONA
SUPREME COURT RULE 38(h)
REGARDING ADMISSION ON
MOTION TO THE STATE BAR
OF ARIZONA

Supreme Court No. _____

**Petition to Amend Arizona
Supreme Court Rule 38(h)
Regarding Admission on Motion
to the State Bar of Arizona**

Pursuant to Rule 28 of the Rules of the Arizona Supreme Court, the State Bar of Arizona ("State Bar") petitions the Arizona Supreme Court to amend Rule 38(h) of the Rules of the Supreme Court as set forth in Appendix A, attached hereto.

I. Overview and Summary of Proposed Changes

Rule 38(h) provides that those applicants who meet the specified requirements may be admitted to practice law in Arizona upon motion. Among other requirements, the rule provides that applicants must have been engaged in the "active practice of law . . . for five of the seven years immediately preceding the date upon which the application is filed." However, the rule excludes employment as a corporate counsel or judicial law clerk in Arizona from qualifying as the active practice of law. Therefore, applicants who have worked in Arizona as corporate counsel or judicial law clerks during the previous five years would not qualify to apply for admission on motion. The State Bar proposes to amend Rule 38(h) such

1 that an applicant's work as a corporate counsel or judicial law clerk in Arizona
2 would qualify as the active practice of law for purposes of Rule 38(h).

3 **II. The Current Rule**

4 The current rule provides that to be eligible for admission on motion, among
5 other requirements, an applicant shall:

6 1(C). have been primarily engaged in the active practice of law in one
7 or more states, territories, or the District of Columbia for five of the
8 seven years immediately preceding the date upon which the
9 application is filed; . . .

10 The current rule also provides:

11 2. For the purposes of this rule, the "active practice of law" shall
12 include the following activities, if performed in a jurisdiction in which
13 the applicant is admitted, or if performed in a jurisdiction that
14 affirmatively permits such activity by a lawyer not admitted to
15 practice; however, in no event shall activities listed under (2)(E) and
16 (F) that were performed in advance of bar admission in the
jurisdiction to which application is being made be accepted toward the
durational requirement: . . . (E) service as a judicial law clerk; or
(F) service as corporate counsel.

17 As a result of this language, an individual who has worked as a corporate
18 counsel or judicial law clerk in Arizona for the last five years would not be eligible
19 to apply for admission on motion. However, an individual who performed the
20 identical work in any other reciprocal jurisdiction would be eligible to apply for
21 admission on motion.

22 **III. The Proposed Rule**

23 The proposed rule would revise the definition of the active practice of law to
24 include work in Arizona as a corporate counsel or judicial law clerk. Credit would
25 be given to individuals who worked as corporate counsel in Arizona prior to the
26 passage of Supreme Court Rule 38(i) or who worked as registered in-house counsel

1 subsequent to the passage of Rule 38(i). *See* Appendix A for a marked version of
2 the proposed Rule 38(h) identifying the requested changes. As a result, candidates
3 would be evaluated equally for work in reciprocal jurisdictions as well as for work
4 in Arizona.

5 **IV. Rationale**

6 The American Bar Association (“ABA”) Section of Legal Education and
7 Admissions to the Bar recently evaluated this issue in the context of proposed
8 revisions to the ABA’s admission-on-motion model rule. The proposal specifically
9 removes language such as that contained in Arizona’s rule. That language did not
10 give credit for work as an in-house counsel or as a judicial law clerk in the
11 jurisdiction for which they were applying to be admitted on motion. The rationale
12 articulated in the proposed ABA rule revision is that the current version “creates ‘an
13 unfair distinction’ between in-house counsel and judicial clerks” and the other
14 lawyers who are categorized in the rule. *See* Appendix B for the ABA Section’s
15 proposed revised model rule and commentary, which is scheduled to go before the
16 ABA’s House of Delegates in February. We would concur with the proposal’s
17 rationale that it is unfair and illogical to exclude individuals who have worked as
18 in-house counsel or as judicial law clerks in Arizona from participating in the
19 admission-on-motion process but allowing those who have done the identical work
20 in a reciprocal jurisdiction to participate in the process.

21 Arizona’s current Rule 38(h) is also inconsistent with the Arizona Rules of
22 Professional Conduct. Those functioning as in-house counsel who are not members
23 of the State Bar of Arizona are practicing law in Arizona, albeit for their employer.
24 However, they are explicitly not considered to be engaging in the unauthorized
25 practice of law under existing Ethical Rule 5.5(d)(1). Prior to the implementation
26 of Rule 38(i), requiring registration by corporate counsel, they were not required to

1 register with the State Bar of Arizona. They were subject to Rule 46(b), which
2 provided the State Bar with limited disciplinary jurisdiction over such attorneys.
3 Rule 38(i) provides a similar disciplinary structure. In both cases, these rules treat
4 acting as a corporate counsel or judicial law clerk as the active practice of law in
5 Arizona, just exempt from requiring bar admission. However, the same activity is
6 not considered the active practice of law for purposes of Rule 38(h).

7 It has been the role of the State Bar of Arizona to regulate the activity of
8 lawyers and ensure that they engage in proper and ethical conduct to help safeguard
9 the public against improper activity by lawyers and to assist in maintaining the
10 integrity of the judicial system through these activities. This allows the regulation
11 of a lawyer's activities and helps make any sanctions or disciplinary actions
12 meaningful and effective. However, the current Rule 38(h) makes it significantly
13 more difficult for experienced lawyers to be admitted to the Bar, even though they
14 are engaged in the active practice of law in Arizona. This would appear to
15 contradict public policy and the legislative intent of regulating lawyers through
16 admission to the State Bar of Arizona.

17 Conclusion

18 The adoption of the proposed rule would eliminate the unfair exclusion of
19 otherwise qualified lawyers who are living and practicing law in Arizona from
20 applying to become members of the State Bar of Arizona through admission on
21 motion. The proposed rule also eliminates an inconsistency between the Supreme
22 Court Rules and the Ethical Rules. The proposed rule also would further the public
23 policy interest in regulating lawyers to the fullest extent possible. That interest is
24 evidenced by the proposal to amend the ABA's model rule and commentary. For
25 these reasons, we urge the Court to adopt the proposed rule as submitted.

1 RESPECTFULLY SUBMITTED this 5th day of January, 2011.

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5 John A. Furlong
6 General Counsel

7 Electronic copy filed with the Clerk
8 of the Supreme Court of Arizona
9 this 5th day of January, 2011.

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11 By: Kathleen A. Lundgren
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APPENDIX A

Arizona Supreme Court Rule 38

(h) Admission on Motion

1. An applicant who meets the requirements of (A) through (H) of this paragraph (h)(1) may, upon motion, be admitted to the practice of law in this jurisdiction.

The applicant shall:

- A. have been admitted by bar examination to practice law in another jurisdiction allowing for admission of licensed Arizona lawyers on a basis equivalent to this rule and currently hold an active license to practice law in that other jurisdiction;
 - B. hold a juris doctor degree from a law school approved by the Council of the Section of Legal Education and Admission to the Bar of the American Bar Association at the time of graduation;
 - C. have been primarily engaged in the active practice of law in one or more states, territories, or the District of Columbia for five of the seven years immediately preceding the date upon which the application is filed;
 - D. submit evidence of a passing score on the Multistate Professional Responsibility Examination as it is established in the jurisdiction;
 - E. establish that the applicant is currently a member in good standing in all jurisdictions where admitted;
 - F. establish that the applicant is not currently subject to lawyer discipline or the subject of a pending disciplinary matter in any other jurisdictions;
 - G. establish that the applicant possesses the character and fitness to practice law in this jurisdiction; and
 - H. submit evidence of successful completion of the course on Arizona law as described in paragraph (h)(5) of this rule.
2. For the purposes of this rule, the “active practice of law” shall include the following activities, if performed in a jurisdiction in which the applicant is admitted, or if performed in a jurisdiction that ~~affirmatively~~ permits such activity by a lawyer not admitted to practice; however, in no event shall any activities that were performed in advance of bar admission in some state, territory or the District of Columbia be accepted toward the durational requirement; listed under (2)(E) and (F) that were performed in advance of bar admission in the jurisdiction to which application is being made be accepted toward the durational requirement;
 - A. representation of one or more clients in the practice of law;
 - B. service as a lawyer with a local, state, or federal agency, including military service;
 - C. teaching law at a law school approved by the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association;
 - D. service as a judge in a federal, state, territorial, or local court of record;

E. service as a judicial law clerk;~~or~~

F. service as corporate counsel;

G. service as corporate counsel in Arizona prior to the effective date of Rule 38(i); or

H. service as corporate counsel in Arizona while registered as in-house counsel pursuant to Rule 38(i).

3. For the purposes of this rule, the active practice of law shall not include work that, as undertaken, constituted the unauthorized practice of law in the jurisdiction in which it was performed or in the jurisdiction in which the clients receiving the unauthorized services were located.
4. An applicant who has failed a bar examination administered in this jurisdiction within five years of the date of filing an application under this rule shall not be eligible for admission on motion.
5. Before being admitted on motion, the applicant must complete a course on Arizona law, the content and method of delivery of which shall be approved by the supreme court.

Appendix B

**AMERICAN BAR ASSOCIATION
SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR**

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

RESOLVED, that the American Bar Association House of Delegates adopts the proposed amendments to the Model Rule for Admission by Motion, dated February 2011.

ABA Model Rule on Admission by Motion

1. An applicant who meets the requirements of (a) through (g) of this Rule may, upon motion, be admitted to the practice of law in this jurisdiction. The applicant shall:

Field C

- (a) have been admitted to practice law in another state, territory, or the District of Columbia and currently hold an active license to practice law in at least one state, territory or the District of Columbia;
- (b) hold a ~~first professional degree in law (first professional degree in law (J.D. or LL.B.))~~ degree from a law school approved by the Council of the Section of Legal Education and Admissions to the Bar of the American Bar Association at the time the graduate matriculated or graduated;
- (c) have been primarily engaged in the active practice of law in one or more states, territories or the District of Columbia for five of the seven years immediately preceding the date upon which the application is filed;
- (d) establish that the applicant is currently a member in good standing in all jurisdictions where admitted;
- (e) establish that the applicant is not currently subject to lawyer discipline or the subject of a pending disciplinary matter in any ~~other other~~ jurisdiction;
- (f) establish that the applicant possesses the character and fitness to practice law in this jurisdiction; and
- (g) designate the Clerk of the jurisdiction's highest court for service of process.

2. For purposes of this rule, the "active practice of law" shall include the following activities, if performed in a jurisdiction in which the applicant is admitted and authorized to practice, or if performed in a jurisdiction that affirmatively permits such activity by a lawyer not admitted in that jurisdiction; however, in no event shall ~~any activities listed under (2)(e) and (f) listed under (2)(e) and (f) that were performed in advance of bar admission in some the state, territory, or the District of Columbia~~ jurisdiction to which application is being made be accepted toward the durational requirement:

- (a) Representation of one or more clients in the private practice of law;
- (b) Service as a lawyer with a local, state, territorial or federal agency, including military service;
- (c) Teaching law at a law school approved by the Council of the Section of Legal

Education and Admissions to the Bar of the American Bar Association;

(d) Service as a judge in a federal, state, territorial or local court of record;

(e) Service as a judicial law clerk; or

(f) Service as in-house counsel as corporate counsel as corporate counsel provided to the lawyer's employer or its organizational affiliates.

3. For purposes of this rule, the active practice of law shall not include work that, as undertaken, constituted the unauthorized practice of law in the jurisdiction in which it was performed or in the jurisdiction in which the clients receiving the unauthorized services were located.
4. An applicant who has failed a bar examination administered in this jurisdiction within five years of the date of filing an application under this rule shall not be eligible for admission on motion.

REPORT

The Section of Legal Education and Admissions to the Bar recommends that the House of Delegates amend the Model Rule on Admission by Motion to eliminate the provision in paragraph 2 that prohibits in-house counsel and judicial law clerks from qualifying on the basis of practice performed in the jurisdiction where admission on motion is being sought. That provision currently states: “however, in no event shall activities listed in (2)(e) [in-house counsel] and (f) [judicial law clerk] that were performed in advance of bar admission in the jurisdiction to which application is being made be accepted toward the durational requirement.”

The Standing Committee on Client Protection raised the concern that this language creates “an unfair and unnecessary distinction” between in-house counsel and judicial clerks and the other categories of lawyers listed in paragraph 2. The Section agrees. For example, Attorney 1 licensed in State A who practices with a federal agency in State B for five years would qualify for admission on motion in State B, while Attorney 2 licensed in State A who practices as in-house counsel in State B for five years would not.

Other provisions of the Rule, which are retained, make clear that the practice has to occur in a jurisdiction “that affirmatively permits such activity by a lawyer not admitted” and “shall not include work that, as undertaken, constituted the unauthorized practice of law.” These provisions prevent an attorney from qualifying if he has skirted any admission or registration requirements a jurisdiction imposes. Thus, in the above example, if State B had not adopted Model Rule 5.5(d)(1) providing “safe harbor” to in-house counsel, Attorney 2 must have complied with any registration or admission requirements in State B in order for the practice to count.

In addition to the elimination of this provision of paragraph 2, other amendments to the Rule are proposed. The other amendments relate to all categories of practice, not just practice as in-house counsel or a judicial clerk.

Paragraph 2 is amended to make clear that any activities undertaken before the applicant was admitted to the bar in some jurisdiction will not count toward the durational requirement under any circumstances. When seeking admission on motion, applicants often expect to count their employment during the period between graduating from law school and passing the bar examination as qualifying practice. This arises most often in the context of service as a judicial clerk, but the Section suggests this bright-line rule should apply to all categories.

In paragraph 1(a), a new provision is added requiring the applicant “currently hold an active license” to practice in at least one jurisdiction. In paragraph 2, a new provision is added requiring the activities take place where the applicant is “authorized to practice.” These new provisions are intended to address situations where an applicant is admitted but not authorized to practice because of inactive status. Some jurisdictions classify lawyers as in “good standing” even if the lawyer is inactive, so the provision of paragraph 1(d) [“the applicant is currently a member in good standing in all jurisdictions where admitted”] is inadequate to address this.

It is recommended that paragraph 1(b) be revised to include a degree from a law school that was ABA approved at the time the lawyer matriculated *or graduated*. This is common under the admission on motion rules already adopted in many jurisdictions. It also is consistent with Interpretation 102-10 of the Standards.

Finally, paragraph 2(f) is revised from “service as corporate counsel” to “service as in-house counsel provided to the lawyer’s employer or its organizational affiliates.” This is more consistent with the wording used in Model Rule 5.5 and the Model Rule for Registration of In-House Counsel.